No. 11,865

IN THE

United States Court of Appeals

For the Ninth Circuit

TRANS-PACIFIC AIRLINES, LIMITED
(a corporation),
Appellant,

vs.

HAWAIIAN AIRLINES, LIMITED
(a corporation),
Appellee.

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

APPELLANT'S OPENING BRIEF.

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STATEMENT OF JURISDICTION.

Appellant was charged with violating the Civil Aeronautics Act of 1938, as amended (49 U.S.C.A. Sec. 481A) in the United States District Court for the Territory of Hawaii. Writ of permanent injunction was entered in said Court on November 10, 1947. Notice of appeal was properly filed in the District Court for the Territory of Hawaii. Within the time allowed by law as extended by Order of the Court, the transcript of record was filed herein. Jurisdiction of this Court to review the said final judgment

of the District Court is sustained by Sec. 128 of the Judicial Code (28 U.S.C.A. Sec. 225).

INTRODUCTORY STATEMENT AND FACTS.

This appeal is premised upon the single proposition of law that the United States District Court for the District of Hawaii acted in excess of its jurisdiction in entertaining respondent's complaint on file herein and in permitting respondent to proceed. It is appellant's contention that respondent's complaint should have been dismissed. The transcript on file herein shows that appellant seasonably and continuously asserted its objection to the District Court's jurisdiction and to any further proceedings in the matter of such complaint.

The facts pertinent to this appeal are: On September 3, 1947, respondent filed its complaint (Transcript: 2-4) alleging plaintiff and respondent to be the holder of a certificate of public convenience and necessity issued to it pursuant to Section 401 of the Civil Aeronautics Act of 1938 as amended (49 U.S.C. 481) authorizing it to engage in air transportation as an air carrier and that it is so engaged. It then alleges that appellant and defendant is likewise so engaged, except that appellant does not have a certificate of public convenience and necessity. The prayer is for an injunction, both permanent and preliminary.

For such purpose, plaintiff must rely upon the express provisions of the Civil Aeronautics Act, since

its rights are purely statutory and in its complaint expressly relies upon Section 1007 of the Act. (49 U.S.C. 647(a).)

The findings of fact and conclusions of law (Transcript: 13-15) find that plaintiff had such a certificate issued to it on June 19, 1939, and that defendant "is an irregular air carrier having a Letter of Registration issued to it by the Civil Aeronautics Board." The Court further finds that defendant "engaged in air transportation, carrying persons and property between points within the Territory of Hawaii as a common carrier and from January 1, 1947, to September 11, 1947, conducted a regular scheduled daily service as a common carrier between points within the Territory of Hawaii without having a certificate of public convenience and necessity from the Civil Aeronautics Board." But the Court after finding defendant to have been an "irregular air carrier having a Letter of Registration" further finds that during the aforesaid period it "has not operated within the allowable limits of Sec. 292.1 of the Economic Regulations of the Civil Aeronautics Board."

The conclusions of law are thus clearly premised on the purported violation of Sec. 292.1 of the Economic Regulations and that therefore defendant "has not operated under any exemption pursuant to Sec. 416 of the Civil Aeronautics Act of 1938." (49 U.S.C. 496.)

The decree and writ of injunction (Transcript: 15-23) then specifically enjoins appellant from operating

without the limits of the District Court's view and interpretation of the Economic Regulations, stating:

> "This injunction will not prohibit operations of defendant in accordance with the exemption granted it by the Civil Aeronautics Board in Economic Regulations, Section 292.1 as amended June 10, 1947, exempting irregular air carriers as authorized by Section 416 of the said Act (49 U.S.C. 496(b); provided, however, that violation of said regulation and of this injunction shall be determined by the application of the standard of regularity currently adopted by the Civil Aeronautics Board, to wit: the operation of aircraft between points or within the Territory of Hawaii in air transportation of persons and property regularly or with a reasonable degree of regularity, which regularity is reflected by the operation of a single flight per week on the same day of each week between the same two points, or is reflected by the recurrence of operations of two round-trip flights, or flights varying from two to three or more such flights, between any same two points, each week in succeeding (88) weeks, without there intervening irregular but frequent intervals during which no such flights are operated so as thereby to result in appreciable definite breaks in service. It is intended by this decree to require irregularity in service between any such points but not to preclude the operation of more than one or two such flights in any given week, nor to prescribe any special maximum limitation upon the number of flights which may be performed in any one week, if infrequency and irregularity of service is otherwise achieved through variations in number of flights and intervals between flights and through frequent and

> extended definite breaks in service. The word 'Point' is herein defined as an airport and all territory in a 25-mile radius;"

The above interpretation is premised upon a decision of the Civil Aeronautics Board in *Matter of the Non-certified Operations of Trans-Caribbean Air Cargo Lines, Inc.* (Docket 2593), decided March 14, 1947.

The decree and writ then contain these very important provisions:

> "Leave to apply for a modification of this decree and the writ issued in pursuance hereof is hereby granted either party in the event the Civil Aeronautics Board shall hereafter modify or rescind the aforesaid regulations or its interpretation placed thereon by said agency;
>
> "Jurisdiction of this cause is retained for the purpose of giving full effect to this decree and for the purpose of making such further and other orders and decrees or taking such further action, if any, as may become necessary or appropriate to carry out and enforce this decree."

Thus by the record on file herein, plaintiff was an air carrier holding a certificate of public convenience and necessity, defendant (and appellant) holds a Letter of Registration as an irregular air carrier (Transcript: Defendant's Exhibit "A": 80), plaintiff sought to enjoin certain operations of defendant, and to reach that result the District Court was compelled to make its own interpretation of a regulation of the Civil Aeronautics Board, after finding that the Board

had issued a Letter of Registration to defendant. This had the effect of exempting defendant and appellant from compliance with Section 401(a) of the Act. (49 U.S.C. 481(a). Thus this action resulted not in essentially being an action to enjoin a violation of Sec. 401(a) of the Act, but, essentially to interpret and define a regulation of the Board, over which the Board could and has exercised full and competent authority, and within its primary jurisdiction, as appellant will hereinafter show.

Appellant continuously insisted that the Civil Aeronautics Board had already complete jurisdiction over it and that it was the province of the Board to interpret its regulations, and to determine the complicated facts essential to a determination of a violation thereof, and that the Board has primary jurisdiction to so do, and until the Board has acted, the District Court is without jurisdiction to do so.

Appellant attacked the jurisdiction of the Court at the time of the hearing on the order to show cause why a preliminary injunction should not issue. (Transcript: Memorandum of Ruling: 10.) The point was seasonably reiterated during the course of the trial as shown by the transcript on file herein. The question of lack of jurisdiction was also raised by appellant under Rule 12(h) of the Federal Rules of Civil Procedure. (Transcript: 30.)

In addition, defendant and appellant had applied to the Board for a certificate of public convenience and necessity (Transcript: Defendant's Exhibit "C":

81) and plaintiff and respondent had one day following the filing of its complaint herein, intervened, and raised the same issues as those raised by its complaint. Thus in further fortification of the primary jurisdiction of the Board, respondent has by its own act, submitted the pertinent issues to the Board, on the basis of a complaint, of which the Board has been given jurisdiction to act by the provisions of Section 1002(a) of the Act. (49 U.S.C. 642.)

APPELLANT'S CONTENTION.

Thus the question on appeal before this Court, and the contention of appellant is that for the very salutary and substantial reasons brought out in appellant's argument and laboriously worked out by the United States Supreme Court in a line of important decisions, the Civil Aeronautics Board had primary jurisdiction of the issues raised by plaintiff's complaint, and the District Court erred in assuming jurisdiction.

ARGUMENT.

Although the question raised by this appeal appears to be novel as applied to the Civil Aeronautics Act of 1938, as amended, and thus of importance in that application, it is by no means novel as applied to the Interstate Commerce Acts, the Federal Communications Act and the Shipping Act. It has been before

the Supreme Court a number of times, and important in the development of the relationship between administrative authority and judicial cognizance.

Having come to be known as the principle of primary jurisdiction, it is admirably stated, and as succinctly as its involvements permit, in 51 Harvard Law Review 1251. The Court is best served by a quotation:

> "Keystone of the arch of administrative regulation is the 'primary jurisdiction' rule. With its requirement that controversies calling for administrative discretion be determined by commissions rather than by courts, following from the formula that these questions are primarily within the jurisdiction of the administrative commission charged with that particular field of regulation, the doctrine of primary jurisdiction has pervaded the entire realm of administrative law. Railroad regulation developed the doctrine, public utility regulation expanded it, tax litigation extended it, and now the rapidly enlarging fields of labor and industrial regulation have adopted it.
>
> "The issue is whether suit may be filed in court or must be brought instead before an administrative commission, when, for example, utility rates are attacked as unreasonable or inapplicable, the denial of certain service is assailed as discriminatory, an assessment is challenged as invalid, or a labor practice is denounced as unlawful. The frequency with which this question arises, particularly in view of the current expansion of administrative regulation, warrants an examination of the scope of the primary jurisdiction rule, for on this rule rests the vital interrelation of courts and commissions.

"One practical generalization is that a remedy created by statute must be pursued according to statutory prescription, whether the prescribed tribunal be court or commission. But the chief development of the primary jurisdiction rule has been in the absence of express statutory provision, or in the face of it; and the major problems arise when the statutory prescription is not clear, a circumstance that necessarily follows from the attempt to apply to a myriad of specific cases a general statute defining administrative jurisdiction.

"The primary jurisdiction of administrative commissions, as invoked by court decisions, has two main branches: (1) exclusive jurisdiction, where the court has no jurisdiction of the subject matter at all, and the commission must decide the question, with judicial review ordinarily only to safeguard the requirements of due process of law, and possible court action to enforce the commission's order; and (2) exhaustion of remedy, where the court has jurisdiction of the subject matter but the suit is premature, and the court refuses to decide the case until all possible administrative determination has been completed.

"Many reasons underlie the courts' enforcement of both aspects of this self-denying doctrine. Expert and continuous study by the administrative agency makes it better qualified than the courts to deal with intricate, technical problems of regulation. *Complaint before a commission may give more adequate relief, because the commission can frame its order to develop future rules and govern allied situations, while the court is concerned primarily with past conduct and is*

necessarily restricted to the facts of the particular case. Uniformity of regulation can be achieved only through administrative determination; otherwise, conflicting decisions of various courts as to the reasonableness of certain rates or practices would lead to the confusion and discrimination that administrative agencies were designed to prevent. Considerations of orderly procedure require that matters within the jurisdiction of the administrative commission be determined by it before courts adjudge the controversy, lest different phases of the same case be pending before the commission and the courts at one time. Moreover, it is a fundamental canon of judicial conduct to avoid interference with legislative or administrative regulation, until it is certain that that regulation imminently threatens to infringe the rights of the petitioner and will not be modified." (Italics supplied.)

Thus, there are several major bases for the principle:

1. Uniformity of regulation;
   (a) Among different cases, involving different persons, and
   (b) Among different District Courts, involving the same person.
2. Complexity of facts, best dealt with by the expertness of the commission or board.
3. Flexibility of the administrative action, not possible in judicial proceedings.
4. Avoidance of multiplicity of action.

5. Reluctance to judicially interfere with the administrative functions based on a "division of labor" of governmental burdens.

The leading case is probably *Texas and Pacific Railway v. Abilene Cotton Oil Co.* (1907), 27 S. Ct. 350, 204 U. S. 426, 51 L. Ed. 553. There the Court had before it, a protest of plaintiff based on a charge of the exaction of discriminatory and unreasonable rates. Justice White, who is now recognized as a leader in developing the applicable principles of administrative law, says on page 440 of 204 U. S.:

> "This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power

in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

Further citations showing the growth and development of the principle will be developed in the course of this argument. Having outlined the *reason* of the

rule there is now another question of fundamental importance not yet referred to. That is: When is the principle applied?

To assert that there are no instances when the courts take cognizance of cases involving commerce would be an obvious absurdity, and, it would be quickly recognized by this learned Court that appellant has not fully analyzed the problem. However, appellant will endeavor to show that the case at bar is one clearly illustrating a typical instance of the application of the rule.

Fundamentally, of course, the rule is applied when the reasons for it require it. However, the Supreme Court has enunciated certain boundary lines for guidance.

In *Great Northern R. Co. v. Merchants Elevator Company* (1922), 42 S. Ct. 477, 259 U. S. 285, 66 L. Ed. 943, a shipper had recovered an alleged overcharge based on a construction of a tariff rule. Justice Brandeis, in not applying the bar to the rule, divided the cases on the basis of whether the question was essentially one of law, and not one of administrative discretion, in which instance the bar of the principle would not apply, or whether it involved fact, or administrative discretion, in which event it would apply. Thus says the learned jurist on page 291 of 259 U. S.:

> "Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administra-

tive, in contradistinction to judicial. But, ordinarily, the determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution. To determine what rate, rule, or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.

"When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. Then extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. Or extrinsic evidence may be necessary to establish a usage of

trade or locality which attaches provisions not expressed in the language of the instrument. Where such a situation arises, and the peculiar meaning of words, or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact. Where the controversy over the writing arises in a case which is being tried before a jury, the decision of the question of fact is left to the jury, with instructions from the court as to how the document shall be construed if the jury finds that the alleged peculiar meaning or usage is established. But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language,—a question of law,—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them, or that a particular usage existed."

And in summary on page 294 of 259 U. S.:

"The petition for certiorari was asked for on the ground that the decision of the supreme court

of Minnesota in this case was in conflict with the above decisions of this court, and also that the decisions in several state courts and in the lower Federal courts were in serious conflict on the question involved. In the brief and argument on the merits, it was also asserted that some recent decisions of this court are in conflict with the rule declared and applied in the American Tie & Timber Co. Case, supra, and the Loomis Case, supra. If, in examining the cases referred to, there is borne in mind the distinction above discussed between controversies which involve only questions of law and those which involve issues essentially of fact, or call for the exercise of administrative discretion, it will be found that the conflict described does not exist, and that the decisions referred to are in harmony also with reason."

Appellant desires to emphasize the thought above: That though respondent can and undoubtedly will show cases where application of the rule has been refused, these cases are not at all inconsistent with appellant's contention, but sustain it on the fundamental premises of the rule, bearing in mind that the case at bar is an instance of the interpretation of an administrative regulation, requiring expert analysis of operating facts, and discretionary application of the regulation, by an administrative authority already clothed with jurisdiction.

Anti-trust suits have been a fruitful source of cases involving the line of demarcation. Thus in *Terminal Warehouse Co. v. Pennsylvania R. Co.* (1935), 56 S.

Ct. 546, 297 U.S. 500, 80 L. Ed. 827, Justice Cardozo in refusing to take cognizance of an action premised on the anti-trust statutes, but involving administrative discretion in the fixing of reasonable rates, first says on page 513 of 297 U.S.:

> "Even so, the right to sue, however explicit on its face, was held to have been partially superseded in respect of private suitors by the adoption of the Shipping Act, which as to transactions within its range gave the only remedy available. The conclusion was reinforced by a reference to Keogh's case and to the need for a uniformity difficult of attainment when jurisdiction is divided.
>
> "What was said in these opinions is precisely applicable here. If a sufferer from the discriminatory acts of carriers by rail or by water may sue for an injunction under the Clayton Act without resort in the first instance to the regulatory commission, the unity of the system of regulation breaks down beyond repair. Texas & P.R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 51 L. ed. 553, 27 S. Ct. 350, 9 Ann. Cas. 1075; Interstate Commerce Commission v. Illinois C. R. Co., 215 U.S. 452, 54 L. ed. 280, 30 S. Ct. 155; Robinson v. Baltimore & O. R. Co., 222 U.S. 506, 56 L. ed. 288, 32 S. Ct. 114; Northern P. R. Co. v. Solum, 247 U.S. 477, 483, 62 L. ed. 1221, 1226, 38 S. Ct. 550; Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285, 291, 66 L. ed. 943, 946, 42 S. Ct. 477, and see U. S. C. A. title 15, Section 26; construed in Central Transfer Co. v. Terminal R. Asso. 288 U.S. 469, 77 L. ed. 899, 53 S. Ct. 444, supra."

But on the other hand, on page 515 of 297 U.S.:

"In thus holding we do not intimate that never in any circumstances can a carrier become a party to a conspiracy in restraint of trade or commerce with liability for treble damages. This has been made plain already. We enlarge on it for greater certainty. Wherein the case is now deficient will be made clearer by example. One may suppose a business of a manufacturer which has assumed the form and size of a monopoly, or if not already at that stage, is well upon the road thereto. Cf. Standard Oil Co. v. United States, 221 U.S. 1, 51, 61, 55 L. ed. 619, 641, 645, 31 S. Ct. 502, 34 L.R.A. (N.S.) 834, Ann. Cas. 1912D, 734; United States v. American Tobacco Co., 221 U.S. 106, 55 L. ed. 663, 31 S. Ct. 632; United States v. United States Steel Corp., 251 U.S. 417, 64 L. ed. 343, 40 S. Ct. 293, 8 A.L.R. 1121; United States v. Swift & Co., 286 U.S. 106, 116, 76 L. ed. 999, 1006, 52 S. Ct. 460. One may add a situation in which a carrier has knowingly confederated with the owner to preserve such a business or foster it. Whatever liability grows out of that alliance is untouched by this decision. For present purposes we may assume that if such a situation should develop, the carrier would make itself a participant in the monopoly which it had conspired to produce, though its only overt act was a discriminatory rate of carriage. Again, a group of manufacturers, whose business in combination would not amount to a monopoly, might unite among themselves to lay a burden upon commerce by concerted action as to prices. Swift & Co. v. United States, 196 U.S. 375, 49 L. ed. 518, 25 S. Ct. 276; United States v. American Linseed Oil Co., 262

U.S. 371, 67 L. ed. 1035, 43 S. Ct. 607; Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U.S. 600, 58 L. ed. 1490, 34 S. Ct. 951, L.R.A. 1015A, 788. If a carrier were to give a preference in furtherance of that conspiracy, it would become a participant therein, or so we may assume, the damages being measured not merely by the consequences flowing from the preference, but by those flowing from the conspiracy in all its comprehensive unity."

Then (page 516):

"We conclude that for Merchants as well as for Pennsylvania whatever liability was incurred through the forbidden discrimination was under the act to regulate commerce and not for treble damages."

And so in *Georgia v. Pennsylvania R. Co.* (1944), 65 S. Ct. 716, 324 U.S. 439, 89 L. Ed. 1051, Justice Douglas refuses to apply the rule to an anti-trust conspiracy case, but on the basis of the large pattern of the entire conspiracy. Thus on page 460 of 324 U.S.:

"The fact that the rates which have been fixed may or may not be held unlawful by the Commission is immaterial to the issue before us. The Keogh Case indicates that even a combination to fix reasonable and non-discriminatory rates may be illegal. 260 U.S. p. 161, 67 L. ed. 187, 43 S. Ct. 47. The reason is that the Interstate Commerce Act does not provide remedies for the correction of all the abuses of rate-making which might constitute violation of the anti-trust laws. Thus a

'zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself.' United States v. Chicago, M. St. P. & P. R. Co., 294 U.S. 499, 506, 79 L. ed. 1023, 1029, 55 S. Ct. 462. Within that zone the Commission lacks power to grant relief even though the rates are raised to the maxima by a conspiracy among carriers who employ unlawful tactics. If the rate-making function is freed from the unlawful restraints of the alleged conspiracy, the rates of the future will then be fixed in the manner envisioned by Congress when it enacted this legislation. Damage must be presumed to flow from a conspiracy to manipulate rates within that zone."

And further (page 462 of 324 U.S.):

"We intimate no opinion whether the bill might be construed to charge more than that or whether a rate-fixing combination would be legal under the Interstate Commerce Act and the Sherman Act but for the features of discrimination and coercion charged here. We are dealing with the case only in a preliminary manner. Cf. Missouri v. Illinois, 200 U.S. 496, 517, 518, 50 L. ed. 572, 577, 578, 26 S. Ct. 268. The complaint may have to be amplified and clarified as respects the coercion and discrimination charged, the damage suffered, or otherwise. We do not test it against the various types of motions and pleadings which may be filed. We construe it with that liberality accorded the complaint of a sovereign State as presenting a substantial question with sufficient clarity and specificity as to require a joinder of issues."

The Court had said on page 455 of 324 U.S.:

> "The policy behind these restrictions placed on suitors by the Congress was aptly stated in Terminal Warehouse Co. v. Pennsylvania R. Co., supra (297 U.S. p. 513, 80 L. ed. 835, 56 S. Ct. 546), as follows: 'If a sufferer from the discriminatory acts of carriers by rail or by water may sue for an injunction under the Clayton Act without resort in the first instance to the regulatory commission, the unity of the system of regulation breaks down beyond repair.' We adhere to these decisions. But we do not believe they or the principles for which they stand are a barrier to the maintenance of this suit by Georgia."

This learned Court will quickly recognize the distinction afforded by these conspiracy cases when it is remembered that a lawful act can be part of a conspiracy if it is to an unlawful end.

Thus, in cases of simple construction of tariff language, akin to the construction of words of a contract (also see *Brown & Sons Lumber Co. v. Louisville & N. R. Co.* (1937), 57 S. Ct. 265, 81 L. Ed. 301, 299 U.S. 393), and cases where the commission action is in itself one of the ingredients of an asserted large pattern of conspiracy, the rule may not be applied.

But where there are facts to be administratively determined, and the action is within that of the Board's field, the reasons of the rule require its application.

On premises identical with those controlling application of the rule of Interstate Commerce cases, the rule of primary jurisdiction has been applied to the Federal Communications Act. In *Rochester Telephone Corp. v. U. S.* (1939), 59 S. Ct. 754, 307 U.S. 125, 83 L. Ed. 1147, a case actually involving the scope of review of an administrative ruling, the Court observes (page 138 of 307 U.S.):

> "Recognition of the Commission's expertise also led this Court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards.
>
> "From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 51 L. ed. 553, 27 S. Ct. 350, 9 Ann. Cas. 1075. *Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked.* The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. Interstate Commerce Commission v. Illinois C. R. Co., 215 U.S. 452, 470, 54 L. ed. 280, 287, 30 S. Ct. 155; Interstate Commerce Commission v. Union P. R. Co., 222 U.S. 541, 56 L. ed. 308, 32 S. Ct. 108." (Italics supplied.)

And in application to the Shipping Act, in *United States Navigation Co. v. Cunard S. S. Co.* (1932), 52 S. Ct. 247, 284 U.S. 474, 76 L. Ed. 408, we find the Supreme Court affirming a dismissal of suit under the anti-trust acts premised on the lawfulness of an agreement within the jurisdiction of the administrative body. The Court says (page 487 of 284 U.S.):

> "It is said that the agreement referred to in the bill of complaint cannot legally be approved. But this is by no means clear. In the first place, while the allegations of the bill must be taken as true upon the motion to dismiss, they still are subject to challenge by pleading and proof if the motion be denied. We cannot assume that, in a proceeding before the board in which the whole case would be open, similar allegations will not be denied or met by countervailing affirmative averments. In any event, it reasonably cannot be thought that Congress intended to strip the board of its primary original jurisdiction to consider such an agreement and 'disapprove, cancel or modify' it, because of a failure of the contracting parties to file it as 15 requires. A contention to that effect is clearly out of harmony with the fundamental purposes of the act and specifically with the provision of p. 22 authorizing the board to investigate *any* violation of the act upon complaint or upon its own motion and make such order as it deems proper. And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to

usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

How appropriate is the language referring to the peculiar nature of ocean traffic, in its application to air traffic!

And in the District Court case of *Adler v. Chicago & Southern Air Lines, Inc.* (Mo. 1941), 41 Fed. Supp. 366, a passenger asserts a claim for alleged failure of passage, and the Court in applying the rule asserts (367):

"The Supreme Court held in the case of United States Navigation Co. v. Cunard Steamship Co., 1932, 284 U.S. 474, 52 S. Ct. 247, 76 L. Ed. 408, that the doctrine of primary jurisdiction likewise applied in cases involving the practices of steamship companies subject to regulation under the Shipping Act of 1916, 46 U.S.C.A. p. 801 et seq. In its decision the Court recognized that the Shipping Act of 1916, in its general scope and purpose, closely parallels the Interstate Commerce Act, 49 U.S.C.A. p. 1 et seq.

"Just as the Shipping Act of 1916 parallels the Interstate Commerce Act, so does the Civil Aeronautics Act of 1938, in its general scope and purpose, closely parallel both the Interstate Commerce Act and the Shipping Act of 1916. Each act creates an administrative agency, and each gives that agency jurisdiction to regulate a par-

ticular type of common carrier, one by land, one by water and one by air. Each commission and board has the power to prescribe reasonable rates, to prevent unjust discrimination and undue preference and prejudice, and to regulate the rules, regulations and practices of the carriers subject to its jurisdiction."

The rule of primary jurisdiction now having been delineated as to its application in its fundamental purposes, the boundaries of its application, and its application to other administrative bodies, we can undertake the question of its application to, first, the Civil Aeronautics Act of 1938 as amended, and secondly, to this case.

Section 401 (a) of the Act (49 U.S.C. 481(a)) provides:

"No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: Provided, That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Board shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein."

Section 416 of the Act (49 U.S.C. 496) provides:

"The Board may from time to time establish such just and reasonable classifications or groups

of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Board finds necessary in the public interest.

"EXEMPTIONS.

"(b) (1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

By virtue of the express authority vested in it by Congress, and in particular under the provisions of the above section, the Board promulgated Economic Regulation 292.1, which in the form as revised and adopted May 5, 1947, effective June 10, 1947, is pertinent in point of time to the matter now before this Court. The full text of the Regulation in the above mentioned revised form is reprinted in full as an appendix hereto.

Thus under the authority of Section 416 of the Act (49 U.S.C. 496) the Board in Section 292.1(c)(1) of the Regulations *exempted all carriers as to whom the Board by issuance of a Letter of Registration* caused the exemption to be effective, from the provisions of Title IV of the Act (except as to certain requirements of standards and reports) of which Section 401(a) (49 U.S.C. 481(a)) is a part. And the only basis of plaintiff and respondent's action is an alleged violation of Section 401(a) from which appellant has, by authorized action of the Board, been exempted.

Then the entire tenor and most of the remaining provisions of the Regulations clearly indicate that the Board having assumed jurisdiction by the issuance of a Letter of Registration had likewise assumed full and complete authority of the matters pertaining to the Regulations, and of *all alleged violations of the Regulations.* Section 292.1(d)(1) of the Regulations expressly provides for the issuance of a Letter of Registration, stating:

> "From and after 60 days after the effective date of this section no Irregular Air Carrier may engage in any form of air transportation unless there is then outstanding and in effect with respect to such air carrier a Letter of Registration issued by the Board: *Provided,* That if any Irregular Air Carrier, otherwise authorized to engage in air transportation pursuant to this section, shall file with the Board within 60 days after the effective date of this section, an application for a Letter of Registration, such applicant may engage in such air transportation until such Let-

ter has been issued, or such applicant has been notified that it appears to the Board that such applicant is not entitled to the issuance of such Letter."

And then Section 292.1(d)(2) specifically provides for a termination of the Letter of Registration, after *action* is taken and findings are made by the Board. It reads:

"Upon the filing of proper application therefor, the Board shall issue, to any Irregular Air Carrier, a Letter of Registration which, unless otherwise sooner rendered ineffectively, shall expire and be of no further force and effect, upon a finding by the Board that enforcement of the provisions of section 401 (from which exemption is provided in this section) would be in the public interest and would no longer be an undue burden on such Irregular Air Carrier or Class of Irregular Air Carriers. Such application shall be certified to by a responsible official of such carrier as being correct, and shall contain the following information: (i) date; (ii) name of carrier; (iii) mailing address; (iv) location of principal operating base; (v) if a corporation, the place of incorporation, the name and citizenship of officers and directors and a statement that at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions; (vi) if an individual or partnership, the name and citizenship of owners or partners; (vii) the types and numbers of each type of aircraft utilized in air transportation. Such application shall be submitted in duplicate in letter form or on C.A.B.

Form No. 2789 which is available on request for the convenience of applicants."

Section 292.1(d)(4) provides for suspension:

"Letters of Registration shall be subject to immediate suspension when, in the opinion of the Board, such action is required in the public interest."

And of particular importance to this appeal are the express provisions of Section 292.1(d)(5) which provides for revocation by reason of violation, after notice *and hearing* by the Board. This section reads:

"Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provision of the Civil Aeronautics Act of 1938, as amended, or of any order, rule or regulation issued under any such provision, or of any term, condition or limitation of any authority issued under said Act or regulations."

Appellant wishes to again point out that appellant had been issued such a Letter of Registration, granted such exemption from Section 401(a) (49 U.S.C. 481(a)), and *at all times* was and is now subject to the control of the Board under the above provisions, which give the Board all necessary power and authority to act.

The entire history and back-ground of Economic Regulation 292.1 and the authority for it vested by Congress under Section 416 of the Act (49 U.S.C. 496) was in recognition of the complex and unique

factual problems incident to air transportation and its present period of development. The public demand for such service, the need of irregular or unscheduled service, the unpredictability of the demand, the highly varying local conditions, and the desire to encourage healthy and proper growth of this comparatively new field of transportation are among the numerous reasons given by the Board, and to be taken as being in the mind of Congress, in vesting in the Board the broad and flexible power of regulation and exemption, provided for in the Act, and for the Board having taken full and complete action under such authority.

The Act itself is further replete with provisions demonstrating the intent of Congress to vest every lawful authority and power in the Board to fully and completely regulate and control air transportation.

Thus the provisions of Section 1002 (a-c) of the Act (49 U.S.C. 642 (a-c)) referred to in the opening statement, and which read:

> "Sec. 1002. (a) Any person may file with the Authority a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provision of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Authority to investigate the matters complained of. Whenever the Authority is of the opinion that any complaint does not state facts which warrant an investigation or action on its part, it may dismiss such complaint without hearing.

"(b) The Authority is empowered at any time to institute an investigation, on its own initiative, in any case and as to any matter or thing concerning which complaint is authorized to be made to or before the Authority by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Authority shall have the same power to proceed with any investigation instituted on its own motion as though it had been appealed to by complaint.

"(c) If the Authority finds, after notice and hearing, in any investigation instituted upon complaint or upon its own initiative, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the Authority shall issue an appropriate order to compel such person to comply therewith."

vests full authority over violations, and the further provisions go on to provide for control of rates and practices.

And Section 411 of the Act (49 U.S.C. 491) empowers the Board to investigate unfair practices. It reads:

"The Authority may, upon its own initiative or upon complaint by any air carrier or foreign air carrier, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier or foreign air carrier has been or is engaged in unfair or deceptive practices or unfair methods

> of competition in air transportation. If the Authority shall find, after notice and hearing, that such air carrier or foreign air carrier is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier or foreign air carrier to cease and desist from such practices or methods of competition."

Further, the very broad powers of the Board, conferred by Section 205 of the Act (49 U.S.C. 425) and of which 205 (a) reads:

> "The Authority is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act."

further illustrates the Congressional intent.

Of corollary value, the extent of judicial review provided in Section 1006 of the Act (49 U.S.C. 646) is in accord with the doctrine of primary jurisdiction of the Board. For example, Section 1006(e) (49 U.S.C. 646(e)) reads:

> "The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so."

Section 1007(a) of the Act (49 U.S.C. 647(a)) provides:

> "If any person violates any provision of this Act, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Authority, its duly authorized agent, or, in the case of a violation of section 401(a) of this Act, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this Act or of such rule, regulation, requirement, order, term, condition, or limitation, and enjoining upon them obedience thereto."

It is on the basis of the last mentioned section that plaintiffs instituted their action.

But these provisions do not provide any such basis of action because defendant and appellant *was exempted* from the provisions of Section 401(a) (49 U.S.C. 481(a)) by having been issued as an administrative act a Letter of Registration under 292.1 of the Economic Regulations promulgated pursuant to Section 416 of the Act (49 U.S.C. 496(a) and (b)), and

were and are now subject to the full administrative power of the Board. A violation of Section 401(a) could thus not be before the Court. By necessity, to entertain the action, the District Court had to construe 292.1 of the Economic Regulations, and consider as a factual matter, a complex body of facts as to its application and violation, a function expressly charged by the Act to the primary jurisdiction of the Civil Aeronautics Board under the Civil Aeronautics Act of 1938 as amended, and by the express provisions referred to.

Thus perforce, at the outset this was *not* an injunction having to do with violation of 401(a), but actually a construction and judicial determination of the application and import of the Economic Regulation of the Civil Aeronautics Board, who had already taken full and complete jurisdiction over appellant when it issued to appellant a Letter of Registration exempting it from compliance with Section 401(a) of the Civil Aeronautics Act as amended. (49 U.S.C. 481(a).)

And to entertain such a proceeding, the Court had to consider an extensive body of facts, and apply administrative discretion under administrative regulations, a function peculiarly primarily administrative.

It would most certainly be extreme to assume that Congress, fully mindful of the long and well-established development of the primary jurisdiction rule, contemplated in enacting Section 1007 that as applied to this specific Act, any different principle should apply. Should we believe, mindful of the salutary

purposes of the rule, and its importance in its application to orderly administrative procedure, that in expanding to this newest field of commerce, that Congress intended to carry with it all established principles of administrative procedure.

Thus the Board in the case at bar, had full power, and even more was charged by Congress with the duty, to consider appellant's specific case, in the light of the intent of the law and Regulations, and even to make a specific regulation pertaining to the operations of this specific matter. The Board could enlarge or decrease, amend or adjust, and determine the application of its regulations, with the broadest of powers. A proper decision required the exercise of administrative discretion as to the public interest, based on as complete scrutiny of the facts by the Board peculiarly and properly equipped to ascertain and determine such facts, and to apply the proper regulations in the light of the entire national interest in air transportation.

Appellant urges that the primary jurisdiction rule in all its features applies to the Act which is pertinent here.

As in the case of the application of the rule to the other Acts, there are instances where the primary jurisdiction rule would not apply. And in enacting Section 1007, Congress can be assumed to have had such instances in mind.

Thus as in the District Court of Alaska decision (*Alaska Air Transport, Inc. v. Alaska Airplane*

Charter Company, No. 5588-A, District Court for the Territory of Alaska, Division Number One, at Juneau) decided August 20, 1947, the enjoined defendant had *neither* certificate of public convenience and necessity, *nor* Letter of Registration. It had not submitted to the jurisdiction of the Board, nor was it under its cognizance. Thus no administrative action, rule or regulation was involved.

But where, as in the case at bar, the Board has acted, and has full cognizance, and it is essentially a valid ruling of the Board which must be construed and applied, requiring attention to complex operating facts, the whole spirit of the rule dictates its application.

Otherwise, as in *Aron v. Pennsylvania R. Co.* (CCA-2, 1935), 80 Fed. (2d) 100, where the Court had before it tariff charges and practices alleged to be in violation of Interstate Commission rulings, the Court in affirming a judgment for defendant, inter alia, on the basis of the rule, states (101):

> "The question of whether or not certain services are within the definition of transportation is not purely a question of law, but it involves the determination of a fact. Atchison, Topeka & Santa Fe R. Co. v. United States, 295 U. S. 193, 55 S. Ct. 748, 752, 79 L. Ed. 1382; Adams v. Mills, 286 U. S. 397, 52 S. Ct. 598, 76 L. Ed. 1184. In the Atchison Case, the court reversed a dismissal of a suit to enjoin an order of the commission on the ground that the orders were invalid for lack of a prior finding of fact by the commission. Similarly, we think the question in this case is not

solely one of law but of fact. The determination may be given collateral effect. See A. J. Phillips Co. v. Grand Trunk Western R. Co., 236 U. S. 662, 665, 35 S. Ct. 444, 59 L. Ed. 774; Keogh v. Chicago & N.W.R. Co., 271 F. 444 (C.C.A. 7); National Pole Co. v. Chicago & N.W.R. Co., 211 F. 65 (C.C.A. 7). And the determination of the commission will not be reversed if it is neither arbitrary nor unsupported by the evidence. Adams v. Mills, 286 U. S. 397, 52 S. Ct. 589, 76 L. Ed. 1184; Standard Oil Co. v. United States, 283 U. S. 235, 51 S. Ct. 429, 75 L. Ed. 999. However, the courts are not concluded from examining anew a question involving the jurisdiction of the commission. See Interstate Commerce Commission v. Union Pacific R. Co., 222 U. S. 541, 547, 32 S. Ct. 108, 56 L. Ed. 308. In accordance with this rule, there have been instances of the court's ruling on whether or not certain situations came within 'transportation.' In the Atchison & Santa Fe Case, supra, on the question of whether a certain situation was 'transportation,' the court said: 'Usage and physical conditions combined definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by section 15(5) (49 U.S.C.A. p. 15 (5)).' This was spoken of shipments which had reached the unloading chutes and were being taken out over a certain route through the stockyards. Even though, in certain circumstances, transportation ends with the delivery of the livestock at the unloading chutes at destination, it does not necessarily end at the unloading chutes where the unloading is an incident in the trip dictated by the Twenty-

Eight Hour Law (34 Stat. 607, 608, 49 U.S.C.A. pp. 71, 72).

"The Hepburn Act of June 29, 1906 (34 Stat. 584, c. 3591), amending the Interstate Commerce Act, broadened the definition of 'transportation' to give the commission jurisdiction over services necessarily incidental to shipment. These incidentals had been the sources by means of which abuses of overcharges and discrimination had been practiced and Congress brought the entire body of such services within the term 'transportation.' See Cleveland, C. C. & St. Louis Railway Co. v. Dettlebach, 239 U. S. 588, 593, 36 S. Ct. 177, 60 L. Ed. 453."

And important to observe (103):

"The determination of damages in the instant case involves a finding of a reasonable rate, and the court will not determine that question without a prior finding by the commission. Although section 9 (49 U.S.C.A. p. 9) gives an apparently clear right to sue, the courts in the interest of uniformity have declined to accept the decision of questions involving functions essentially belonging to the commission. Great Northern R. Co. v. Merchants' Elevator Co., 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943; Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Robinson v. Baltimore & O. R. Co., 222 U. S. 506, 32 S. Ct. 114, 56 L. Ed. 288; Norge Corporation v. Long Island R. Co. (C.C.A. 2), 77 F. (2d) 312. The court below correctly declined to entertain this suit, since there had been no prior finding by the

Interstate Commerce Commission as to these appellants' damages."

And as aptly stated in *Armour & Co. v. Alton R. Co.* (1941), 61 S. Ct. 498, 312 U. S. 195, 85 L. Ed. 771:

"A court's adjudication of this question in this case would not uniformly benefit all shippers for whom respondents have transported livestock. Whether or not such a refund would amount to a discrimination should be determined by studies such as those the Interstate Commerce Commission is especially empowered to make.

"Sixth. The complaint alleges that petitioner is willing to accept delivery at any point in the station area. What the station area embraces is not defined. Whether there is property in the area on which the railroads could erect pens is not shown. To decide this issue would require a court to define the boundaries of a station named in a tariff approved by the Interstate Commerce Commission.

"The complexities of the situation here presented are graphically illustrated in the companion case of Swift & Co. v. Alton R. Co., 238 Inters Com Rep 179. Swift, one of Armour's competitors, took its petition for alteration of the same long-standing practice directly to the Commission. That expert body found it a necessary prerequisite to decision to have a trial examiner conduct extensive hearings, compiling in the process a record of 5 volumes, 1147 pages, and numerous exhibits.

> "The principles making up the so-called primary jurisdiction doctrine are well settled. This is obviously a case for this application." (Page 201 of 312 U. S.)

Not only is the question of uniformity of decision as among courts compelling in its force to require application of the rule, but also uniformity of decision as among courts applying to this specific case.

If the view of the District Court in the case at bar was upheld, the various courts which could take jurisdiction could express various and conflicting rulings. A defendant would then be subject to as many possible decisions as there are Districts in which its operations are conducted. These considerations show the importance to orderly administrative procedure established by the rule.

The very decree and writ granted by the District Court in the case at bar illustrates in a most effective way the reasons why the Court should have asserted the rule of primary jurisdiction and refused jurisdiction.

In the decree and writ the Court endeavored to repeat some of the language of Sec. 292.1 of the Economic Regulations and then to apply as a measuring rod a specific application made by the Board in what appears to be a Board decision—*Matter of the Noncertified Operations of Trans-Caribbean Air Cargo Lines, Inc.*—Docket 2593—decided March 14, 1947. In so doing, the Court, in absence of the opportunity

which the Board would have had, was forced to seize upon a situation utterly unlike and of no relationship to that of appellant.

Trans-Caribbean operates in an entirely different area, over a 3000 mile route with entirely different aircraft, and entirely different effect on the national interest in air transportation. It is for the Board to say in the exercise of the duty charged upon it by Congress what the requirements of public interest would properly be as applied to the specific operation of appellant.

The entire decree and writ evidences that the District Court was hard put to word the decree and writ so that it would be workable under the practical exigencies of operation. So in recognition of the difficulty the District Court had to insert the provision to which attention has heretofore been invited, to wit:

> "Leave to apply for a modification of this decree and the writ issued in pursuance hereof is hereby granted either party in the event the Civil Aeronautics Board shall hereafter modify or rescind the aforesaid regulations or its interpretation placed thereon by said agency;"

Thus the decree and writ by its very terms is thrown open to any future administrative processes of the Board. The District Court has thus in effect been forced to admit the jurisdiction of the Board, but nevertheless entered a decree and writ violative of the primary jurisdiction of the Board, and which can only serve to confuse and conflict with orderly ad-

ministrative procedure, rather than to clarify and assist, which is the true function of judicial procedure.

SUMMARY.

In summation, appellant wishes to emphasize that the District Court did not in effect enjoin a violation of Section 401(a) of the Act (49 U.S.C. 481(a)), but actually in every sense, construed and applied an administrative regulation. Appellant was by the very terms of the Act and its Letter of Registration exempt from Section 401(a), and its alleged violation of the Regulation giving basis to such exemption, the only question which could be, and which was decided, was one which by every reason for the established rule of primary jurisdiction, should have been determined by the Board. Most certainly the rule applies to the Act, and it is not to be believed Congress intended any other result. The violation, if any, would be one of complex fact, requiring administrative discretion, and of which uniformity of decision is most essential, all of which are major criteria requiring application of the rule of primary jurisdiction.

The Economic Regulations to begin with are created out of administrative discretion, based on long factual investigation, and their application to a given case can be no different.

Appellant respectfully prays that the judgment and decree be reversed, the writ of injunction be ordered

vacated, and the matter remanded with a direction of dismissal.

Dated, San Francisco, California,
September 13, 1948.

Respectfully submitted,
SAI CHOW DOO,
FREDERICK L. HEWITT,
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BLAIR AND BLAIR,
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(Appendix Follows.)

Appendix.

Appendix

Section 292.1 of the Economic Regulations

IRREGULAR AIR CARRIERS

(a) *Applicability.*—This section shall not apply to any air carrier authorized by a certificate of public convenience and necessity to engage in air transportation, to Alaskan Air Carriers, to operations within Alaska, or to any non-certificated air carrier engaged in air transportation pursuant to special or individual exemption by the Board or pursuant to exemption created by any other section of the Economic Regulations.

(b) *Classification.*—There is hereby established a classification of non-certificated air carriers to be designated as "Irregular Air Carriers." An Irregular Air Carrier shall be defined to mean any air carrier (1) which does not hold a certificate of public convenience and necessity under section 401 of the Civil Aeronautics Act of 1938, as amended, (2) which directly engages in interstate or overseas air transportation of persons and property or foreign air transportation of property only, and (3) which does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. No air

carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points. Within the meaning of this definition a "point" shall mean any airport or place where aircraft may be landed or taken-off, including the area with a 25-mile radius of such airport or place.

(c) *Exemptions.*

(1) *General.*—Except as otherwise provided in this section, Irregular Air Carriers shall be exempt from all provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, other than the following:

(i) Subsection 401(1) (Compliance with Labor Legislation);

(ii) Section 403 (Tariffs);

(iii) Subsection 404(a) (Carrier's Duty to Provide Service, etc.), only in so far as said subsection requires air carriers to provide safe service, equipment, and facilities in connection with air transportation;

(iv) Subsection 404(b) (Discrimination);

(v) Subsection 407(a) (Filing of Reports): *Provided,* That no provision of any rule, regulation, term, condition or limitation prescribed pursuant to said subsection 407(a) shall be applicable to Irregular Air Carriers unless such rule, regulation, term, condition or limitation expressly so provides;

(vi) Subsection 407(b) (Disclosure of Stock Ownership);

(vii) Subsection 407(c) (Disclosure of Stock ownership by Officers or Directors);

(viii) Subsection 407(d) (Form of Accounts): *Provided,* That no provision of any rule, regulation, term, condition or limitation prescribed pursuant to said subsection 407(d) shall be applicable to Irregular Air Carriers unless such rule, regulation, term, condition or limitation expressly so provides;

(ix) Subsection 407(e) (Inspection of Accounts and Property);

(x) Section 408 (Consolidation, Merger, and Acquisition of Control): *Provided,* That Irregular Air Carriers shall be exempt from section 408 in so far as said section would make it unlawful, without prior approval by the Board, (a) for any Irregular Air Carrier or any person controlling any such carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of another Irregular Air Carrier, (b) for any Irregular Air Carrier to consolidate or merge with another Irregular Air Carrier, and (c) for any Irregular Air Carrier or any person controlling any such air carrier to acquire control of another Irregular Air Carrier; *Provided further,* That any Irregular Air Carrier which consolidates or merges with another Irregular Air Carrier and any Irregular Air Carrier or any person controlling any such carrier that acquires control of, or purchases, leases or contracts to operate the proper-

ties, or any substantial part thereof, of another Irregular Air Carrier pursuant to the exemption granting herein, shall submit to the Board, not more than 30 days following the consummation of the transaction, a report indicating in reasonable detail the nature and result of the transaction.

(xi) Subsection 409(a) (Interlocking Relationships): *Provided,* That if an application by any Irregular Air Carrier for approval of an interlocking relationship in existence on the effective date of this section is filed with the Board prior to a date 30 days after the effective date of this section, such air carrier may retain the officer, director, member, or stockholder involved in such relationship pending final disposition by the Board of said application: *Provided further,* That Irregular Air Carriers shall be exempt from subsection 409(a) in so far as said subsection would make it unlawful, without prior approval by the Board, (a) for any Irregular Air Carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in another Irregular Air Carrier, (b) for any Irregular Air Carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in another Irregular Air Carrier;

(xii) Subsection 409(b) (Profit from Transfer of Securities);

(xiii) Section 410 (Loans and Financial Aid);

(xiv) Section 411 (Methods of Competition);

(xv) Section 412 (Pooling and Other Agreements): *Provided,* That Irregular Air Carriers shall be exempt from section 412 until 60 days after the effective date of this section: *Provided further,* That Irregular Air Carriers shall be exempt from section 412 in so far as said section would require any Irregular Air Carrier to file with the Board a copy or a memorandum of certain contracts or agreements (other than contracts or agreements for pooling or apportioning earnings, losses, traffic, service or flying equipment), or of modifications or cancellations thereof, between such carrier and any other Irregular Air Carrier;

(xvi) Section 413 (Form of Control);

(xvii) Section 414 (Legal Restraints);

(xviii) Section 415 (Inquiry into Air-Carrier Management);

(xix) Section 416 (Classification and Exemption of Carriers).

(2) *Additional Exemptions for Irregular Air Carriers Utilizing Small Aircraft.*—Subdivisions (ii), (iv), (vi), (vii), (x), (xi), (xiii) and (xv) of subparagraph (1) of this paragraph shall not apply to any Irregular Air Carrier which does not utilize in its air transportation services any single aircraft unit having an allowable gross take-off weight in excess of 10,000 pounds, or three or more aircraft unit (not including any aircraft unit having an allowable gross

take-off weight of less than 6,000 pounds) having an aggregate allowable gross take-off weight in excess of 25,000 pounds.

(3) *Additional Temporary Exemptions in Foreign Air Transportation.*—Notwithstanding any other provisions of this section, Irregular Air Carriers for a period of three months after the effective date of this section, shall, with respect to foreign air transportation of persons, be exempt from all provisions of sections 401 (except subsection 401(1)) and 403 of the Civil Aeronautics Act of 1938, as amended, only, however, to the extent that such foreign air transportation of persons is confined to operations of the type exempted under section 292.1 prior to this revision of such section.

(4) *Approval of Certain Interlocking Relationships.*—To the extent that any officer or director of an Irregular Air Carrier would, without prior approval by the Board, be in violation of any provision of subsection 409(a)(3) of the Civil Aeronautics Act of 1938, as amended, by reason of any interlocking relationship with another Irregular Air Carrier, such relationship is hereby approved.

(5) *Effect on Other Statutes.*—The exemptions hereinabove granted from certain provisions and requirements of sections 408, 409, and 412 shall not constitute an order made under such sections, within the meaning of section 414, and shall not confer any immunity or relief from operation of the "antitrust

laws," or any other statute (except the Civil Aeronautics Act of 1938, as amended), with respect to any transaction, interlocking relationship or agreement otherwise within the purview of such section.

(6) *Operational Reports by Irregular Air Carriers.* —On or before July 20, 1947, and thereafter on or before the 20th day of every October, January, April and July, each Irregular Air Carrier, except those Irregular Air Carriers utilizing only small aircraft, as specified in subparagraph (2) of this paragraph, shall file with the Board a quarterly operational report covering the period of the three preceding calendar months, showing all flights operated in air transportation during such period, and stating, with respect to each such flight, the dates of departures and arrivals and the origin, destination and intermediate points served. Whenever any Irregular Air Carrier theretofore utilizing only small aircraft, as specified in subparagraph (2) of this paragraph, undertakes to utilize in its air transportation services any single aircraft unit having an allowable gross take-off weight in excess of 10,000 pounds, or three or more aircraft units (not including any aircraft unit having an allowable gross take-off weight of less than 6,000 pounds) having an aggregate allowable gross take-off weight in excess of 25,000 pounds, such Irregular Air Carrier shall notify the Board in writing within not more than ten days after the actual commencement of such utilization.

(d) *Registration for Exemption.*

(1) *Letter of Registration Required.*—From and after 60 days after the effective date of this section no Irregular Air Carrier may engage in any form of air transportation unless there is then outstanding and in effect with respect to such air carrier a Letter of Registration issued by the Board: *Provided,* That if any Irregular Air Carrier, otherwise authorized to engage in air transportation pursuant to this section, shall file with the Board within 60 days after the effective date of this section, an application for a Letter of Registration, such applicant may engage in such air transportation until such Letter has been issued, or such applicant has been notified that it appears to the Board that such applicant is not entitled to the issuance of such Letter.

(2) *Issuance of Letter of Registration.*—Upon the filing of proper application therefor, the Board shall issue, to any Irregular Air Carrier, a Letter of Registration which, unless otherwise sooner rendered ineffective, shall expire and be of no further force and effect, upon a finding by the Board that enforcement of the provisions of section 401 (from which exemption is provided in this section) would be in the public interest and would no longer be an undue burden on such Irregular Air Carrier or Class of Irregular Air Carriers. Such application shall be certified to by a responsible official of such carrier as being correct, and shall contain the following information: (i) date;

(ii) name of carrier; (iii) mailing address; (iv) location of principal operating base; (v) if a corporation, the place of incorporation, the name and citizenship of officers and directors and a statement that at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions; (vi) if an individual or partnership, the name and citizenship of owners or partners; (vii) the types and numbers of each type of aircraft utilized in air transportation. Such application shall be submitted in duplicate in letter form or on C.A.B. Form No. 2789 which is available on request for the convenience of applicants.

(3) *Non-transferability of Letter of Registration.*—A Letter of Registration shall be non-transferable and shall be effective only with respect to the person named therein.

(4) *Suspension of Letter of Registration.*—Letters of Registration shall be subject to immediate suspension when, in the opinion of the Board, such action is required in the public interest.

(5) *Revocation of Letter of Registration.*—Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provision of the Civil Aeronautics Act of 1938, as amended, or of any order, rule or regulation issued under any such provision, or of any term, condition or limitation of any authority issued under said Act or regulations.

(e) *Separability.*—If any provision of this section or the application thereof to any air transportation, person, class of persons, or circumstance is held invalid, the remainder of the section and the application of such provisions to other air transportation, persons, classes of persons, or circumstances shall not be affected thereby. (52 Stat. 984 and 1004, as amended; 49 U. S. C. 425a and 496b).

NOTE: The record-keeping and reporting requirements of this section have been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN,
Secretary.

(SEAL)